

EDDIE STEWART, President
DIRK ELSPERMAN, Senior Vice President
ROBERT C. LANHAM, Vice President
JOEL ZINGESER, Treasurer
STEPHEN E. SANDHERR, Chief Executive Officer
JEFFREY D. SHOAF, Chief Operating Officer



VIA EMAIL (MBX.OMB.FOIA@OMB.eop.gov)
FAX (202-395-3504)
AND FIRST-CLASS MAIL

December 5, 2018

Ms. Dionne Hardy
FOIA Officer
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, DC 20503

Re: APPEAL OF FOIA REQUEST NUMBER 2018-481 (FOR RECORDS RELATING TO EXECUTIVE ORDER 13502)

Dear Ms. Hardy,

On August 10, 2018, the Associated General Contractors of America (AGC) submitted the attached request for records to the Office of Management and Budget (OMB) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552. As you will see, this request was for all records of all reports that federal departments and agencies had provided to OMB between July 20, 2010, and June 15, 2017, relating to their consideration or use of project labor agreements in accordance with Executive Order 13502. Shortly thereafter, on August 14, 2018, AGC received the attached email from you, acknowledging OMB's receipt of this request and explaining that it had "been logged in" and it was "being processed."

The relevant regulations provide that the FOIA Officer for OMB "will determine within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of [any requests for information or records] whether it is appropriate to grant the request." 5 C.F.R. §1303.10(c). The regulations further provide that the FOIA Officer "will immediately provide written notification to the person making the request." *Id.* Finally, they explain that "[in] unusual circumstances" this time limit "may be extended" but "for not more than 10 days (excepting Saturdays, Sundays or legal public holidays)" and only "by written notice to the persons making the request." *Id. at §1303.10(f).*

Nevertheless, as of the date of this letter, AGC has yet to receive any additional information from OMB. AGC has yet to receive any notice of any determination that its request is not appropriate. AGC has yet to receive any notice of any extension. And AGC has yet to receive any records.

If you turn to your calendar, you will readily see that OMB's delay in making its determination and providing AGC with notice of that determination has now extended for a period of fifty-six days (excepting Saturdays, Sundays and legal public holidays) beyond the twenty-day deadline. With all due respect, I submit that this delay is in violation of both the letter and the spirit of the relevant regulations

(cited herein) and the FOIA. *See 5 U.S.C. § 552(a)(6)(A)*. On behalf of AGC, I hereby appeal for a prompt remedy of that violation. If the delay follows or amounts to a determination, without the legally required notice, that AGC's appeal is not appropriate, I also appeal that determination.

AGC still hopes and intends to resolve this dispute with OMB amicably. On November 6, 2018, AGC called and left a voice message with the FOIA Requester Service Center at (202) 395-3642, seeking to determine the status of its request.¹ To AGC's regret, OMB has provided no response to that message, and it is in this particular context that AGC now finds itself obligated to make this appeal.

At the same time, if OMB remains unresponsive, and now neglects to act on this appeal by the deadline that the relevant regulations have set,² AGC will have to consider legal action.

Thank you for your turning attention to this matter.

Sincerely,



Michael E. Kennedy
General Counsel

Attachments

¹ Please note that OMB's FOIA website (<https://www.whitehouse.gov/omb/freedom-information-act-foia/>) provides an incorrect number for the FOIA Requester Service Center, indicating that the last four digits of that number are 3542 and not 3642.

² The relevant regulations also provide that "[d]eterminations of appeals will be set forth in writing and signed by the Deputy Director or his designee, within 20 days (excepting Saturdays, Sundays and legal public holidays)." 5 C.F.R. §1303.10(e).

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VIA EMAIL (OMBFOIA@omb.eop.gov)
FAX (202-395-3504)
AND FIRST CLASS MAIL

August 10, 2018

Dionne Hardy, FOIA Officer
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, DC 20503

Re: Request for Records Relating to Executive Order 13502 (Project Labor Agreements)

Dear Ms. Hardy:

Pursuant to the Freedom of Information Act 5 U.S.C. § 552 (hereinafter the "FOIA") and its implementing regulations, 5 C.F.R. §§ 1303.1 et al., and on behalf of the Associated General Contractors of America (hereinafter "AGC"), I hereby request your production of all records of all reports that federal departments and agencies have provided to the Office of Management and Budget (hereinafter "OMB") on or relating to their the use of project labor agreements (hereinafter "PLAs") in accordance with Executive Order 13502 (hereinafter the "Order"), as and to the limited extent noted below.

A prompt and complete response to this request is critical to the public's interest in ensuring economy and efficiency in federal procurement and the responsible use of taxpayer dollars. As a result, I further request that OMB disclose such records to AGC within the 20-day timeframe found in 5 C.F.R. § 1302.10(c).

I. Background for Request

President Obama issued the Order on February 6, 2009.¹ The Order "encourage[s] executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in federal procurement." To implement the Order, the Federal Acquisition Regulation Council issued a final rule (hereinafter "FAR Rule") on April 13, 2010.² To require federal departments and agencies to provide OMB

¹Exec. Order No. 13,502 available at: <https://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13502.pdf>

² 75 Fed. Reg. 19168 (April 13, 2010) available at: https://www.acq.osd.mil/dpap/cpic/cp/docs/Executive_Order_Final_Rule_PLA-%20Apr_13_2010.pdf

with information on their subsequent use of PLAs, OMB issued Memorandum M-09-22 (hereinafter the “Memorandum”) on July 20, 2010.³

The Order and the FAR Rule continue to govern the use of PLAs on most of the federal government’s large-scale construction projects. OMB does not, however, continue to gather information on their use, for it rescinded the Memorandum on June 15, 2017.⁴

This request is therefore limited to the period that began on July 20, 2010, and ended on June 15, 2017. During this period, the Memorandum required all federal agencies and departments to submit quarterly reports to OMB identifying all contracts awarded in connection with large scale construction projects, including the contract number, dollar value of the total contract award, and the product and service code describing the project. The Memorandum further required that for each such contract, agencies should indicate whether a PLA was required in the solicitation, provide a brief explanation of the considerations in deciding whether a PLA was appropriate for the project, and specify at what organizational level the decision was made.

II. Description of Records Sought

Please produce all records of the text, data and any other information included in the Reports that OMB received between July 20, 2010, and June 15, 2017, pursuant to the Memorandum, including but not limited to all records that OMB received at the following email address, provided only that all such records are in OMB’s possession, custody or control: activity-report@omb.eop.gov

For the purposes of this request, the term “records” means anything denoted by the use of that word or its singular form in the text of the FOIA and includes all reports, memoranda, notes, notices, facsimiles, charts, tables, presentations, submissions and other writings (handwritten, typed, electronic or otherwise produced, reproduced or stored).

For purposes of this request, “produce” means locate, duplicate and transmit true and accurate copies the requested records to the undersigned and “production” refers to the location, duplication and transmission of the requested records to the undersigned.

For the purposes of this request, records “in OMB’s possession, custody or control” means all records in the possession, custody or control of any office of the OMB and includes all records in or on the personal computers, cellphones or other devices, or personal email accounts that the OMB staff uses for any government purpose.

³ Peter R. Orzag, Implementation of the President’s Executive Order on Project Labor Agreements (M-09-22), OFFICE OF MANAGEMENT AND BUDGET (July 10, 2009) *available at*: https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-22.pdf

⁴ Mick Mulvaney, Reducing Burden for Federal Agencies by Rescinding and Modifying OMB Memoranda (M-17-26), OFFICE OF MANAGEMENT AND BUDGET (June 15, 2017) *available at*: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-26.pdf>

III. AGC Requests a Waiver or Reduction of All Fees.

The FOIA and the OMB's related regulations require the agency to waive or reduce its fees for producing records in accordance with the FOIA if OMB determines that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester."⁵ AGC's request for the production of all records of the information included in the Reports that OMB received between July 20, 2010, and June 15, 2017, pursuant to the Memorandum, meets if not exceeds these statutory and regulatory requirements, and for that reason, AGC requests OMB to waive or reduce all fees that it would otherwise charge for producing such records.

A. AGC's Request is in the Public Interest.

AGC's request is squarely in the public interest. A debate over PLAs and whether they routinely streamline or otherwise facilitate the construction of improvements to real property has continued for many decades and may relate as far back as the 1930s.⁶ While prime construction contractors have used PLAs throughout the nation to construct a wide variety of projects, the percentage of all projects constructed under PLAs remains very small and the vast majority of those PLAs were voluntarily negotiated between private parties. The research on the more general effects that PLAs are likely to have on the construction process, and whether they have the same effects when a public owner requires them, remains inconclusive.⁷

The requested records promise to advance that research. They will provide significant insights into the case-by-case determinations that federal departments and agencies made over a period of several years and yield the most comprehensive data ever assembled on such determinations. In 1998, the Government Accountability Office confirmed that "there is no complete or comprehensive database on the use of PLAs."⁸ The requested records promise to fill a significant portion of that gap.

B. The Production of the Requested Records Will Contribute Significantly to Public Understanding of the Operations or Activities of the Federal Government.

As a threshold matter, the requested records relate to and concern the operations and activities of the federal government. They relate to and concern Executive Order 13502, how the federal departments and agencies responsible for the procurement of federal construction projects (hereinafter "Federal Procurement Agencies") have implemented that measure, and how OMB has monitored and exercised its own influence over the implementation of that measure. On a

⁵ 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 5 C.F.R. § 1303.70.

⁶ Gerald Mayer, Project Labor Agreements, CONGRESSIONAL RESEARCH SERVICE (July 1, 2010) available at: https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1859&context=key_workplace

⁷ *Id.*

⁸ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PROJECT LABOR AGREEMENTS: THE EXTENT OF THEIR USE AND RELATED INFORMATION (MAY 1998) available at: <https://www.gao.gov/assets/230/225719.pdf>

more granular level, they also relate to the process that the Federal Procurement Agencies have used to determine on a case-by-case basis whether a project labor agreement would advance the federal government's interest in the economic and efficient procurement of construction projects and the conclusions such agencies have reached, all in accordance with Executive Order 13502 and the FAR Rule.

The production of the requested records will contribute significantly to the public understanding of those operations and activities because AGC can and will share the conclusions that it derives from those records with the public. Among other things, AGC hopes and expects to inform the public of any significant trends in the way that the Federal Procurement Agencies have evaluated and used PLAs (including any differences among departments and agencies, among regions of the country and/or among categories of construction) during the relevant period. AGC has ample capacity to communicate its conclusions to both its members and the public and a long history of disseminating information to both.

AGC's ongoing operations require it to maintain multiple channels of communication with its more than 27,000 members and their hundreds of thousands of employees across the nation. When one combines that broad audience with the many others that AGC's several channels of communication are also capable of reaching, the likely audience is more than reasonably broad.⁹

AGC has a history of incorporating information that it derives from government records into reports, articles, and other communications that it then disseminates to its members and their employees, and to members of the public, all for free. AGC has no intention of using the requested records or any conclusions that AGC derives from those records for any commercial purpose. Rather, AGC will incorporate its findings into communications that then it disseminates for free. As of August of 2018, the AGC's many channels of communication include, but are not limited to, the following:

- AGC publishes news articles to its website (available to the public at www.agc.org) and updates that website daily, drawing well over one million visits a year.
- AGC publishes 20 electronic newsletters, regularly distributing them to hundreds of thousands of both members and non-members.
- AGC regularly publishes information for its followers on Facebook (10,800 likes) and Twitter (34,600 followers).
- AGC publishes a magazine bi-monthly, entitled *Constructor*, with over 27,000 subscribers.
- AGC's activist email list includes more than 56,000 individuals.
- AGC has a network of 88 state and local chapters stretching from Puerto Rico to Hawaii and those chapter regularly redistribute information that AGC provides to them.

AGC also issues press releases; participates in press conferences and interviews with reporters and editorial writers; and distributes information to the media. AGC also testifies before

⁹ See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

Congress; appears on television, radio, and web broadcasts and at conferences; and contributes to numerous national newspapers, magazines, and other periodicals. AGC has more than 20 staff members involved in its communications activity.

Specific examples of AGC communications would include the following:

- Study, "Preventing Fatalities in the Construction Industry," April 2017.
 - Commissioned by AGC and conducted by the Myers-Lawson School of Construction at Virginia Tech.
 - Available at: <https://www.agc.org/industry-priorities/safety-health/construction-fatalities-study-0>
- Public Survey Report, "2017 Highway Work Zone Safety Survey," May 2017.
 - Organized by AGC Senior Director of Safety and Health Kevin Cannon, AGC Chief Economist Ken Simonson and AGC Senior Executive Director of Public Affairs Brian Turmail.
 - Available at: <https://www.agc.org/news/2017/05/25/2017-highway-work-zone-safety-survey>
- Public Service Announcements, National Advertising and Outreach Campaign to Urge Summer Travel Motorists to Stay Alert While Driving in Work Zones, May 2017.
 - Organized by AGC Senior Executive Director for Public Affairs Brian Turmail and aired in numerous states throughout the nation
 - Available at: <https://www.agc.org/news/2017/05/25/construction-group-launches-new-highway-work-zone-safety-effort-44-percent-road>
- Article, "Government Construction Spending at Six-Year Low," Wall Street Journal, Aug. 1, 2013.
 - Featuring AGC Chief Economist Ken Simonson
 - Available at: <https://blogs.wsj.com/economics/2013/08/01/government-construction-spending-at-six-year-low/>
- Public Survey Report, "Two-Thirds of Contractors Have a Hard Time Finding Qualified Craft Workers to Hire Amid Growing Construction Demand," August 2016.
 - organized by AGC Chief Economist Ken Simonson and AGC Senior Executive Director of Public Affairs Brian Turmail
 - Available at: <https://www.agc.org/news/2016/08/31/two-thirds-contractors-have-hard-time-finding-qualified-craft-workers-hire-amid>
- Video, "How Bad are Construction Worker Shortages?" Aug. 2016.
 - created by AGC Director of Communications Andrew Burke
 - Available at: https://www.youtube.com/watch?v=AYqJ_4hCMr8
- Article, "As Construction Heats Up, So Does Worker Shortage," USA Today, Aug. 26, 2015.

- Featuring AGC Annual Workforce Survey and AGC Chief Economist Ken Simonson)
- Available at: <https://www.usatoday.com/story/money/markets/2015/08/26/construction-worker-shortage/32430517/>
- Testimony of Leah Pilconis, AGC Senior Environmental Counsel, before the Senate Committee on Environment and Public Works, May 3, 2017.
- Available at: <https://www.epw.senate.gov/public/index.cfm/2017/5/infrastructure-project-streamlining-and-efficiency-achieving-faster-better-and-cheaper-results>

As these examples demonstrate, AGC has the ability to digest, synthesize and quickly disseminate information to a broad audience of interested persons. AGC expects and intends to use the requested records to contribute to the public's understanding of when and how PLAs to improve the federal procurement of construction projects and the larger construction process.

C. The Production of the Requested Records Is Not Primarily in the Commercial Interest of the Requester

AGC is a not-for-profit corporation organized under the laws of the District of Columbia. AGC has no interest in making any commercial use of the requested records. AGC does not act as a middleman, reselling information that it obtains from the federal government under the FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"¹⁰ AGC's entirely non-commercial interest is reviewing, analyzing, and disseminating presently non-public information about the subject of this request, as AGC has repeatedly done with other government data.

As noted, the information gathered by OMB on this topic relates to a matter of considerable public interest and concern. Production of the requested records will contribute significantly to public understanding of PLAs and their potential impact on economy and efficiency in federal procurement.

IV. AGC is a "Representative of News Media"

To determine the fees that it will normally charge to satisfy a request for records under the FOIA, OMB puts all requests into one of the following categories and then follows certain rules that generally apply to each one:

- (1) Commercial use requesters;
- (2) Educational or noncommercial scientific institution requesters;
- (3) Requesters who are representatives of the news media; and
- (4) All other requesters.¹¹

¹⁰ Id.

¹¹ 5 C.F.R. § 1303.50.

Within the meaning and for the purposes of the regulation that creates these categories and sets forth the rules that generally apply to each one, the undersigned is a “representative of the news media.” Indeed, AGC easily meets the criteria that the FOIA and OMB have set forth for that particular category.¹² In addition his other responsibilities, and in the specific context of this request, the undersigned is actively gathering news for an organization that regularly disseminates news to the public, including but not limited to news about the federal government’s operations and activities. Such operations and activities, particularly as they relate to PLAs, are of current interest to the public.

AGC’s core functions include gathering and disseminating news to the public, and it is organized and operated to that as well as other ends. As noted earlier, AGC publishes original news articles on the latest trends and developments in and relating to the construction industry in various newsletters, on its website (www.agc.org) and in a printed magazine entitled *Constructor*. AGC also publishes action alerts and any number of reports and analyses. AGC also maintains a significant number of additional communication vehicles on the internet through its Facebook and Twitter accounts, where it generally provides daily messages publicly distributed through such outlets. The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public.¹³

If OMB does not waive all fees that it would otherwise charge to grant this request, OMB should still reduce those fees for the reasons already noted: this request is in the public interest, the production of the requested records will contribute significantly to public understanding of the operations or activities of the federal government and the production of the requested records is not primarily in the commercial interest of the requester. In that case, OMB should also use the fees that it would normally charge a “representative of the news media” as its starting point.

V. Willingness to Pay Fee Under Protest

Whether or not OMB waives or reduces all fees, AGC requests the agency promptly to locate, duplicate and transmit the requested records to the undersigned. If necessary, AGC will pay fees in accordance with OMB regulations, for all or a portion of the requested records, under protest. If AGC does pay such fees, it will reserve its rights to seek administrative or judicial review of OMB’s denial of a waiver or appropriate reduction of such fees. AGC merely requests OMB to contract the undersigned before taking any action that would cause such fees to exceed \$1,000.

¹² See 5 U.S.C. § 552(a)(4)(A)(ii); 5 C.F.R. § 1303.30(j).

¹³ See *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

VI. Conclusion

Please email the requested records to the undersigned at kennedym@agc.org. If that is not possible, please mail the requested records to the undersigned the following street address:

Michael E. Kennedy
General Counsel
Associated General Contractors of America
2300 Wilson Boulevard, Suite 300
Arlington, VA 22201

In addition, please produce the requested records on a rolling basis. OMB's search for (or deliberations over) certain records should not delay the production of other records that OMB has already located and elected to duplicate.

Finally, if OMB determines any of the requested records are publicly available, please also notify undersigned of that fact and identify the place where such records are publicly available.

Thank you for devoting your time and your attention to this matter.

Sincerely,


Michael E. Kennedy
General Counsel

From: MBX OMB FOIA <MBX.OMB.FOIA@OMB.eop.gov>
Sent: Tuesday, August 14, 2018 11:51 AM
To: Mike Kennedy <kennedym@agc.org>
Subject: RE: FOIA Request for Records

Greetings: This email acknowledges receipt of your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated August 10, 2018, and received in the office on August 14, 2018. Your request has been logged in and is being processed. For your reference, the OMB FOIA number is 2018-481.

Sincerely,
Dionne Hardy

From: Mike Kennedy <kennedym@agc.org>
Sent: Friday, August 10, 2018 9:46 AM
To: MBX OMB FOIA <MBX.OMB.FOIA@OMB.eop.gov>
Subject: [EXTERNAL] FOIA Request for Records

Ms. Hardy –

Per the attached letter, the Associated General Contractors of America requests copies of certain records relating to Executive Order 13502 and required by OMB Memorandum M-09-22 between July 20, 2010 and June 15, 2017.

Thank you for devoting your time and your attention to this matter.

Michael E. Kennedy
General Counsel
Associated General Contractors of America
2300 Wilson Boulevard, Suite 300
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Direct: 703-837-5335
Email: kennedym@agc.org